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July 31, 1998

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

**Re: In the Matter of Annual Assessment of the Status of Competition in
Markets for the Delivery of Video Programming
CS Docket No. 98-102
Comments of the Small Cable Business Association**

Dear Ms. Salas:

On behalf of the Small Cable Business Association ("SCBA"), we enclose for filing an original and nine (9) copies of SCBA's comments in the above-captioned proceeding. Please distribute copies of SCBA's comments to each of the Commissioners.

Please call us with any questions.

Very truly yours,

Lisa M. Chandler

Lisa M. Chandler

cc: **Small Cable Business Association**

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

**Annual Assessment of the Status
of Competition in Markets for the
Delivery of Video Programming**

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CS Docket No. 98-102

**COMMENTS OF THE
SMALL CABLE BUSINESS ASSOCIATION**

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July 31, 1998

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**Before the
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Delivery of Video Programming)	

**COMMENTS OF THE
SMALL CABLE BUSINESS ASSOCIATION**

I. INTRODUCTION AND SUMMARY

Filling the interstices between clustering MSO's and mega-mergers of communications giants, independent cable businesses continue their efforts to bring high quality, reasonably priced cable and telecommunications services to smaller communities and rural America. Contrary to popular perception, recent industry trends suggest that the number of small cable companies may be increasing. Smaller companies are acquiring systems left behind by clustering, and initial successes in expanding services in smaller markets have attracted entrepreneurs and investors to replace retiring cable pioneers.

Independent cable businesses in these markets face increasing competition from DBS providers, rural telcos and others. In addition to competitive pressures, small cable businesses face a range of costly compliance issues, including EAS, digital must-carry and set-top box changes. The 1998 Competition Report provides a superb opportunity to focus the attention of Congress and the Commission on the regulatory and competitive impediments facing small cable businesses.

For independent cable businesses to succeed in an increasingly competitive environment, the Commission and Congress must release small cable from disparate legal, regulatory and competitive burdens. The Small Cable Business Association ("SCBA") submits these comments to encourage the Commission to act on pending small cable issues within its jurisdiction. SCBA also asks the Commission to recommend to Congress certain changes to the Communications Act and the Copyright Act that would alleviate certain unintended competitive disparities.

SCBA represents nearly 300 smaller, independent cable businesses and hundreds of small cable systems throughout the United States, serving more than 2 million customers. The majority of SCBA's member systems serve fewer than 1,000 subscribers. SCBA represents the unique interests of small cable businesses before the Commission, Congress and other agencies. Much of SCBA's work involves seeking relief from the disproportionately high administrative burdens and costs that many regulations impose on small cable. These disparate burdens impede the ability of small cable to compete and should be addressed in the 1998 Competition Report.

SCBA's comments focus on five competitive issues facing small cable businesses:

- **Program access.** The need to expand the program access rules to address discriminatory practices by non-vertically integrated programmers and to include other vertically integrated MVPDs, like DBS providers.
- **Pole attachment abuse.** The need to repeal the co-op exemption from pole attachment regulation under 47 U.S.C. § 224(a)(1).
- **Regulatory parity with DBS.** The need for DBS providers to have similar regulatory burdens as those borne by small cable.

- **Affiliation rules.** The need to modify the Commission's interim definition of an affiliated entity for purposes of defining small cable operators.
- **Copyright reform.** The need to correct the Copyright Office's current application of the cable compulsory license that requires certain small cable systems to pay disproportionately high copyright costs.

II. **PROGRAM ACCESS: ADJUSTMENTS TO THE PROGRAM ACCESS RULES WILL ENHANCE SMALL CABLE'S ABILITY TO COMPETE.**

Program access remains a core concern of SCBA's members. Small cable businesses continue to struggle with certain programmers to obtain certain popular programming on reasonable terms. The current program access rules provide little relief for three reasons: (1) the ability of programmers to refuse to deal with buying groups that do not impose joint and several liability on their members; (2) the exclusion of non-vertically integrated programmers; and (3) the exclusion of other vertically integrated relationships, principally DBS providers and programmers.

A. **Certain programmers use the absence of joint and several liability as an excuse to avoid dealing with buying groups.**

For most small cable businesses, programming costs now exceed one-third of total operating costs. For some small businesses, it approaches half of total operating costs. Unlike large MSOs, small cable businesses do not have the market power to negotiate volume discounts. To overcome this obstacle, many of SCBA's members have joined the National Cable Television Cooperative ("NCTC"), a national cable programming buying group. NCTC has built solid relationships with most programmers; others continue to hold out. For that programming, small cable businesses must pay the highest rates, unlike DBS providers and other competitors.

Current rules exclude from program access protection buying groups that do not impose joint and several liability on members. The Commission should rescind this rule insofar as it applies to NCTC. NCTC has a proven track record of on-time payment. In its sixteen years, NCTC has never missed a single payment. NCTC serves more than half of the country's cable systems and more than 7.5 million cable homes — NCTC has significant financial reserves from which to pay programmers. Dealing with NCTC can provide programmers with greater security than dealing directly with an individual cable system.

SCBA asks the Commission to adjust its rules so that programmers can no longer avoid dealing with buying groups with sufficient financial reserves based on the joint and several liability requirement. This will alleviate a significant competitive disparity hampering small cable.

B. Non-vertically integrated programmers also refuse to deal with buying groups.

NCTC continues to encounter intransigence when seeking programming deals with certain non-vertically integrated programmers. To date, NCTC cannot secure reasonable programming agreements with the following:

- Disney - The Disney Channel, Toon Disney, and the ESPN services, plus Arts & Entertainment and Lifetime (both jointly owned with ABC/Hearst).
- CBS - Eye on People, Country Music Network, The Nashville Network.

- **USA Network¹**

This programming represents core satellite services that small cable businesses must offer to compete with DBS and other competitors. Still, because these programmers will not sell programming to NCTC at rates comparable to similarly situated MVPDs, small cable must pay a steep premium. Anti-competitive motives lurk behind this conduct.

As non-vertically integrated programmers, current rules allow Disney and CBS to decline dealing with NCTC or its individual members. These programmers still compete with cable, however, through their ownership of broadcast networks and stations. Digital television will heighten this competition. Broadcasters may offer multiple channels of programming, essentially turning traditional broadcasters into MVPDs.

The Commission or Congress should address this competitive disparity. The program access rules should apply to all cable programmers, regardless of whether they are vertically integrated.

C. The program access rules should apply to all vertically integrated programmers.

The program access rules presently apply to only vertically integrated programmers and cable operators. Current rules permit programmers that are vertically integrated with non-cable MVPDs, like DBS providers, to deny small cable access to their programming. This creates a competitive imbalance between non-cable MVPDs and cable operators,

¹ Although it recently became vertically-integrated, USA Network still has not reached a satisfactory agreement with NCTC.

since vertically integrated non-cable MVPDs can parlay their programming ties into better programming deals.

To maintain a level playing field, non-cable MVPDs and cable operators must receive similar regulatory treatment. This includes expanding the program access rules to apply to other multichannel video programming distributors.

III. POLE ATTACHMENTS - CONGRESS SHOULD ELIMINATE THE CO-OP EXEMPTION PROVIDED BY 47 U.S.C. § 224(A)(1).

Pole attachment rate abuse presents the next principal threat to small cable's ability to compete. The problems in this area spring from the co-op exemption that allows rural telephone and electrical cooperatives to avoid regulation of pole attachment rates and terms.

Small cable businesses suffer severe competitive disadvantages with respect to pole attachment rates. In its earlier comments, SCBA noted that small cable pays significantly higher pole attachment rates than larger MSOs.² The per subscriber cost is substantially greater. In addition, small cable businesses typically use a far greater number of poles to reach fewer subscribers, because they largely serve rural areas.

The co-op exemption compounds this competitive imbalance. Last year, SCBA provided several examples of rural electric cooperatives charging unjustifiable pole attachment rates.³ The problems continue.

² See *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, Comments of the Small Cable Business Association (filed July 23, 1997), at 16 ("SCBA 1997 Comments").

³ See SCBA 1997 Comments at 19-21.

- Rural Route Video, Bayfield, Colorado. Rural Route Video provides service to 500 subscribers in three communities in rural Colorado. It has 21 miles of aerial plant. Rural Route Video rents pole space from co-op La Plata Electric Association, Inc. Rural Route Video recently received notice from La Plata that its pole attachment rates would increase from \$3.50 per pole to \$9.63,⁴ a 175% increase. In contrast, Rural Route Video rents space for \$4.00 per pole from a regulated telephone company in the same area. An anti-competitive motive drives the increase. La Plata Electric intends to begin offering communications services, including multichannel video programming.
- The Finger Lakes Cable Corporation, Elmira, New York: Finger Lakes Cable serves 55 customers in the Town of Tuscarora, New York, with less than 5 miles of plant. Finger Lake Cable presently uses poles owned by Steuben Rural Electric Cooperative, Inc. The current rate: \$7.00 per pole. The co-op recently notified Finger Lakes Cable and other cable operators that beginning December 1998, the rate will increase 100% to \$14.00.⁵ Again, Steuben Rural Electric competes with Finger Lakes Cable by offering DBS financing, installation and programming.

⁴ See Letter dated July 15, 1998 to Rural Route Video from La Plata Electric Association, Inc. (Exhibit A).

⁵ See Letter dated July 1, 1998 to The Finger Lakes Cable Corporation from Steuben Rural Electric Cooperative, Inc. (Exhibit B).

Many SCBA members face similarly spiraling pole costs from cooperative utilities that also offer video services. The co-op exemption has outlived its protective purpose and is now used as a competitive weapon. To balance the competitive environment, Congress should eliminate it.

IV. DBS - SMALL CABLE MUST HAVE REGULATORY PARITY WITH ITS BIGGEST COMPETITOR

DBS presents the biggest competitive challenge to small cable. DBS can reach rural areas and can entice customers with extensive channel line-ups. DBS providers do not contend with many of the administrative burdens and costs imposed on small cable. DBS providers remain free of leased access obligations, must-carry obligations, franchise fees, PEG access and other requirements. Especially in the case of small cable, this unfairly gives DBS an additional competitive edge. SCBA requests that the Commission act on its DBS public interest obligations rulemaking and require DBS providers to have similar public interest obligations that small cable operators have.

V. AFFILIATION RULES

The Commission's rules include a number of criteria for defining small cable operators and small cable systems. The Commission's interim definition of small cable operators goes beyond that which Congress intended. The Commission deems an operator as being "affiliated with another entity if that entity holds a 20 percent or greater equity interest, passive or active, in the operator or exercises de jure or de facto control over the operator."⁶

⁶ 47 C.F.R. § 76.1403(c).

The Commission's interim affiliation definition negatively impacts a small cable operator's deregulated status under the 1996 Telecommunications Act. It exacerbates the difficulties small cable businesses face in attracting capital because even passive investors can return an erstwhile small system to regulated status.

SCBA reiterates its request for the Commission to repeal its interim rule and replace it with a definition that comports with Congress' intent — to limit the availability of deregulation so only those cable systems owned by large media conglomerates do not qualify.

VI. COPYRIGHT REFORM

The Copyright Office's current application of the compulsory cable copyright license under 17 USC § 111 imposes unjustifiably higher costs on certain small cable systems. These higher costs restrict the ability of small cable systems to upgrade systems, add services and ultimately to compete with DBS and other providers. The Commission should highlight these issues in the 1998 Competition Report.

A. The Fox affiliate surcharge.

The first issue involves Fox Network affiliates. The Copyright Office still treats Fox Network affiliates as "independent stations" rather than "network stations." As a result, certain small systems that must carry an out-of-market Fox affiliate can pay over \$0.66 per month per subscriber in copyright royalties alone just to carry Fox. This presents a small cable issue because the systems that are facing this cost increase are usually smaller systems that are consolidating headends so that the cable system serves more than one

market. Similarly, some small cable systems cannot carry an in-market Fox affiliate, so they must carry an out-of-market affiliate to offer popular Fox programming.

The anticompetitive result of this situation becomes most apparent when one compares the Copyright Office's application of Section 111 with Section 119, the compulsory license for DBS providers. In Section 119, Congress adopted the Commission's definition of "network." Under that definition, Fox affiliates are clearly network stations, as the Commission has consistently found.

Still the Copyright Office maintains that small cable businesses cannot consider Fox affiliates as network stations for cable copyright royalty purposes. The result: Small cable faces higher programming costs than its DBS competitors.

B. The market quota issue.

The second issue involves the continued use of the Commission's outdated market quota rules. Because the Copyright Office continues to apply these rules through Section 111, small cable businesses serving smaller markets face significantly higher copyright costs, solely because of geography.

The Copyright Office has acknowledged the unfairness of the result of "the crazy quilt application of old FCC rules":

Cable systems that are seemingly similarly situated nonetheless pay widely different sums to the Copyright Office because of how much the cable system grossed, or how many signals they would have been permitted to carry under FCC rules that existed in the 1970s.

* * *

These anomalies were demonstrated in the comments of St. Croix Cable TV [a small cable company] which paid \$61,390 in copyright royalties for the

second semiannual period of 1996, but the same system located in Miami or Puerto Rico would have paid only \$16,300.⁷

While the Office acknowledges the small cable problem, small cable's interests remain overlooked amidst the fight for copyright relief for DBS providers, small cable's biggest competitor.

Higher copyright costs for small cable seriously hinder many small systems' ability to expand services, consolidate headends and compete with DBS. The 1998 Video Competition Report should highlight these issues.

VII. CONCLUSION

Independent cable businesses continue to face disparate administrative burdens and costs from current laws and regulations. These burdens impede small cable's ability to compete and deliver improved cable and telecommunications services to smaller communities and rural America.

The Commission, Congress and consumers desire high quality video and telecommunications services at a reasonable cost. Yet, Congress, the Commission, and state and local regulations impose a multi-tiered array of compliance costs on cable operators. For small cable, the high per subscriber cost of compliance adds up quickly, sapping funds that could otherwise help small cable provide high-speed data, digital programming and other services. Without these services, small cable's ability to compete becomes more doubtful.

⁷A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, U.S. Copyright Office (August 1, 1997), at 36.

In reviewing the status of video competition, SCBA asks the Commission to balance the desires of the regulators with the effects on the regulatees, their customers and communities. In the end, what purpose does a regulation serve if its costs cause a small business to forego offering new and improved services, or worse, shut down?

SCBA asks the Commission to include the competitive impediments discussed in these Comments within its 1998 Video Competition Report, to act on those within its jurisdiction and to recommend congressional action on those items outside the Commission's jurisdiction.

SMALL CABLE BUSINESS ASSOCIATION

By: 

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Attorneys for the Small Cable Business
Association

July 31, 1998

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EXHIBIT A

**Letter dated July 15, 1998
to
Rural Route Video from
La Plata Electric Association, Inc.**



La Plata Electric Association, Inc.
OWNED BY THE CO-OP MEMBERS SINCE 1936

P.O. Drawer H • Durango, Colorado 81302-2750 • (970) 247-5786 • FAX (970) 247-2674

July 15, 1998

Microwave Distribution Services, Inc.
DBA Rural Route Video
Attn: Chris Mae
P.O. Box 169
Bayfield, CO 81122

RECEIVED JUL 24 1998

Dear Mr. Mae,

As you are probably aware, your contract with La Plata Electric Association, Inc., for Joint Use Attachments expires on June 19, 2010. We have enclosed the new contract for your review and signature. There have been several revisions to the contract including a change in the fee for a pole attachment after an analysis of the present cost, as the current agreement allows for those provisions.

During 1997, La Plata Electric Association, Inc., began the process of reevaluating the present cost of Joint Use Attachments to decide if an adjustment in the attachment fee was warranted. After examining the current cost for a pole attachment compared to the expenses incurred, we determined that an increase in the fee would be justified. The cost summary for La Plata Electric Association, Inc., is attached explaining the expenses which include: Maintenance, A&G, Tax, and Depreciation. The future cost for an attachment, based on the study, will be \$9.63 per attachment per year.

Previously, there have been few specifications as to the procedures for attaching to LPEA's poles, however, with the new contract, the attachments must meet the standards of the National Electrical Safety Code (NESC). Before attachment to LPEA poles occurs, there must be detailed construction plans, maps, and drawings for each pole line submitted to La Plata Electric Association, Inc. This paperwork must be approved by a representative from LPEA in order for the next step to continue. The details for the new procedures are listed in the new contract, beginning on page 2. The steps outlined in the contract will be required to ensure public safety as well as form documentation for engineering purposes.

If you have any questions or concerns, please don't hesitate to call me at (970) 382-3531. Thank you for your cooperation.

Sincerely,


Steve Gregg
Operations Superintendent

cc: Greg Munro, Assistant General Manager/Operations

Enclosures

EXHIBIT B

**Letter dated July 1, 1998
to
The Finger Lakes Cable Corporation
from
Steuben Rural Electric Cooperative, Inc.**

Steuben Rural Electric Cooperative, Inc.

P.O. BOX 272
9 WILSON AVENUE
BATH, NEW YORK 14810-0272
607/776-4161 FAX 607/776-2293 800/843-3414

July 1, 1998

Mr. John Sullivan
The Finger Lakes Cable Corporation
P.O. Box 3461
Elmira, New York 14805-3461

Dear Mr. Sullivan:

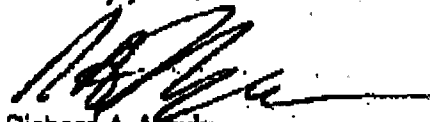
For the past 20 years, the Steuben Rural Electric Cooperative, Inc. has maintained our pole attachment charges at \$7 per pole, per year. Recent rulings of the Federal Communications Commission have given guidance on computing pole attachment fees. Although the Cooperative's pole attachment charge is not regulated, we have used the Federal Communications Commission rules to evaluate our pole attachment charges. Based on these rules, our annual pole attachment charges should be \$29 per pole, per year.

On review of these charges by our Board of Directors and in consideration of the impact of changing these charges on the companies that pay them, we have adopted the following schedule to change these charges:

1. For charges billed in December 1998, the rate will increase from \$7 to \$14 per pole.
2. For the billing of December 1999, the rate will increase from \$14 to \$21 per pole.
3. Subsequent billing rates will be adjusted based on the Consumer Price Index.

We regret having to increase these charges in a dramatic manner; however, in fairness to all of our customers, we must make all charges consistent with industry practice.

Sincerely yours,



Richard A. Moyle
General Manager

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